



# **Mechanical Subcontractor Issues and Recommendations Regarding GC/CM**

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- GC/CM Subcontract Agreement Terms
- Change Order Administration on Large and Complex GC/CM Projects
- Prime Contract MACC Contingency and Incentive Provisions Tied to MACC Contingency
- Subcontractor Bidder Eligibility

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### **Subcontractor Issues Concerning GC/CM Subcontract Agreement Terms**

#### **A. Overview of Subcontractor Concerns**

Subcontractors are concerned that GC/CM subcontract agreements include unfair risk shifting provisions, require subcontractors to provide specified general conditions work which either has been contracted to be performed by the GC/CM in the GC/CM's agreement with the Owner or which could be more efficiently provided by the GC/CM as specified general conditions work, and include work scope not customarily performed by the subcontract bidders performing the work that predominates the bid package. Subcontractors believe that subcontract agreements with these problems increase construction cost and result in higher bid prices.

#### **B. Background**

Subcontractors bidding traditional Design-Bid-Build construction projects typically include conditions and exclusions in their bid proposals regarding the assumptions that form the basis of their bid prices and subcontract terms. After the bidding, subcontractors bidding DRB projects are able to negotiate mutually acceptable subcontract terms with the general contractor that received the award of the project. The GC/CM statute places limitations on subcontractor bidding and subcontract negotiation. RCW 39.10.061(6) requires that GC/CM subcontracts be competitively bid with public bid openings and that subcontracts be awarded to the responsible bidder submitting the low responsive bid. GC/CM subcontract bid package bidders are precluded from including conditions or exclusions in their bid proposals and from negotiating subcontract terms which vary from the subcontract in the GC/CM's bid invitation. As a result, GC/CM contractors may include subcontract scope and terms which might otherwise be negotiated out of the final form subcontract. While some public owners utilizing GC/CM require the public owner's approval of the form of subcontract used by the successful GC/CM, many public owners do not review or approve subcontract agreement terms.

#### **C. Examples of Unfair Risk Shifting Provisions from GC/CM Subcontracts**

1. Subcontract Agreements Requiring the Subcontract Bid Package Subcontractor to Coordinate the Work of other Subcontract Bid Package Subcontractors

"6.3.1 The [Subcontract Bid Package Subcontractor] shall have the primary duty to coordinate Contractor's Work with the work of others. The [GC/CM] will resolve

conflicts between the [Subcontract Bid Package Subcontractor] and others; the [GC/CM's] decision is binding upon the [Subcontract Bid Package Subcontractor] in this regard. The [GC/CM] agrees that [Subcontract Bid Package Subcontractor] shall cooperate with Owner, the [GC/CM] and other subcontractors performing work on Owner's premises so that the Work and the work of others connected with the Work shall progress smoothly with a minimum of delays due to interference between various contractors/subcontractors on Owner's premises."

"3.7 The [Subcontract Bid Package Subcontractor] shall be responsible for interface and coordination of this work with all other Contractors/trades."

*Comment: Most GC/CM prime contracts uniformly obligate the GC/CM, not the GC/CM's subcontractors, to coordinate the work of subcontractors. Subcontract bid package subcontractors have no control over other subcontract bid package subcontractors. Where market conditions permit, these provisions may result in higher subcontract bid prices.*

2. Subcontract Agreements That Permit the GC/CM to Reschedule and Resequence Subcontract Bid Package Subcontractor's Work Without Recourse

"4. Subcontractor further acknowledges that as construction progresses, it may be necessary for GC/CM to change the sequential order and duration of the various activities, including those contemplated by this Subcontract Agreement to account for unanticipated delays, occurrences and other factors which act to alter GC/CM's original schedule. GC/CM may require Subcontractor, at no additional cost to GC/CM, to prosecute Subcontractor's work in such sequence as the progress of other subcontractors and the Project schedule dictates. It is expressly understood and agreed that the scheduling and sequencing of the Work is an exclusive right of GC/CM and that GC/CM reserves such right fully to reschedule and resequence Subcontractor's work from time to time as the demands of the Project require without any additional cost or expense to be paid to Subcontractor."

"20.02 Master Schedule. It should be anticipated that there will be disruptions in the sequence of your work. The overall coordination of all work on site will be managed on a weekly basis at the Superintendent coordination meetings. This meeting is mandatory for all trades on site. Shift work and uneven crew sizes will be required to meet the schedule and logistic demands of the project. Please refer to the schedule in Attachment "E". This schedule is for reference only; it is subject to change and to be updated periodically based on project conditions and actual work performance. [GC/CM] reserves the right to update the project schedule for the betterment of the project as a whole [sic], not for the advantage of the parts."

*Comment: Subcontract bid package subcontractors base their bid prices on the construction schedule included in the Subcontract bid package bid documents and on performing their work in accordance with industry standard sequences and durations. The anticipated schedule and industry standard sequences and durations are the basis of the bargain and bid price. When the GC/CM*

*changes the schedule or resequences the work, subcontractors performing labor-intensive bid packages experience increased costs of performance and other damages. GC/CM contracts include Changes and MACC Contingency provisions for subcontractor claims or charges arising out of changes to the work and coordination errors. Provisions like those above are sometimes used to prevent subcontractors from recovering increased cost of performance due to schedule changes in situations where the GC/CM has rescheduled or resequenced the work due to no fault of affected subcontractors. Where market conditions permit, these provisions may result in higher subcontract bid prices.*

3. Subcontract Agreements That Do Not Permit Subcontractors to Recover Increased Costs for Delay Caused by Others and Only Permit a Time Extension

“6.3 Should Subcontractor be delayed in commencement, prosecution or completion of the Work by any cause beyond Subcontractor’s control and not due to an fault, neglect, act or omission on its part, then Subcontractor shall be entitled to an extension of time. Such extension shall be for a period equivalent to that granted to GC/CM by Owner under the Contract Documents for the same cause of delay, and shall release and discharge GC/CM from any and all claims by Subcontractor on account of the delay. Subcontractor shall not be entitled to any extension of time unless a claim therefor is presented in writing to GC/CM within five (5) calendar days of the commencement of such claimed delay. Notwithstanding the foregoing, Subcontractor shall be entitled to compensation for delay if, and to the extent, that GC/CM secures compensation from Owner for delay on behalf of Subcontractor.”

*Comment: Subcontractors experience increased costs from delay which should be recoverable where the subcontractor is not responsible for the delay. Where market conditions permit, these provisions may result in higher subcontract bid prices.*

4. Subcontract Agreements Which Include Inadequate Overhead and/or Profit Compensation for Changes to the Work

“12.2. The maximum percentage allowance added to itemized costs under a lump sum proposal or to actual field cost shall be ten percent (10%) for changed or extra Work performed by Subcontractor’s own forces and an additional five percent (5%) for changed or extra Work performed by a sub-subcontractor. This allowance will be paid as fully compensation for Subcontractor’s and sub-subcontractor’s profit, general superintendent, hand tools, capital and interest expense, field office expense, overhead, and all other elements of extra cost not defined herein as actual field cost. Notwithstanding the foregoing, the allowance payable to Subcontractor and its subcontractors pursuant to this paragraph shall not exceed the lesser of (a) 15% or (b) the maximum mark-up permitted in the Contract Documents for changed or extra work less[GC/CM]’s mark-up on such work.”

*Comment: Subcontract bid package bidders performing labor-intensive subcontract work frequently have actual overhead in excess of 10% of their direct labor, material and equipment*

*direct costs. Where market conditions permit, these provisions may result in higher subcontract bid prices.*

5. Subcontract Agreements Requiring Subcontractor Be Responsible for Damage to Their Work Regardless of Fault

“8.6 Subcontractor shall be solely responsible for protection of its Work and for loss or damage to materials, tools, equipment, or other personal property, owned or rented or used by Subcontractor in performance of its Work.”

*Comment: Subcontract bid package subcontractors can and do take reasonable precautions against damage by other trades. However, each trade should be responsible for damage to other trade's work caused by their forces. Where market conditions permit, these provisions may result in higher subcontract bid prices.*

6. Subcontract Agreements Containing Provisions Making Payment Contingent Upon the GC/CM Receiving Payment from the Public Owner

“D. “Subcontractor will receive payments from Contractor only in amounts allowed to Contractor by Owner on account of Subcontractor's work and only to the extent of Subcontractor's interest therein, less any deduction or offsets allowed to be deducted under this Subcontract or by law, in any event, no payment, including payment of retention or other compensation to Subcontractor for work hereunder, shall be due Subcontractor from Contractor unless and until Contractor has received such payment from Owner. Receipt by Contractor of such payment from Owner, shall constitute and is acknowledged by Subcontractor to be an express condition precedent to Contractor's obligation to pay Subcontractor. . . .”

“7.3 . . . GC/CM and Subcontractor expressly agree that payment to GC/CM on the Subcontractor's account by the Owner is an absolute condition precedent to GC/CM's obligations to pay the Subcontractor under this Subcontract. Subcontractor expressly agrees that it relies on the credit of the Owner, not GC/CM, for payment of its Work. . . .”

“21.4 Any claim by Subcontractor as a result of acts, errors or omissions of Owner or its agents or representatives, including without limitation Architect, may be advanced by [GC/CM] at its election and in its sole discretion. If [GC/CM] decides in good faith not to proceed with such claim, Subcontractor shall be entitled to proceed with its claim directly against the Owner or its agents. If [GC/CM] elects to advance Subcontractor's claim, Subcontractor's right of recovery on such claim shall be limited solely to that dollar amount and other relief, which is recovered by [GC/CM] on behalf of Subcontractor from Owner. [GC/CM] shall not be liable to the Subcontractor for any monies or other relief except those granted to [GC/CM] by Owner for the benefit of Subcontractor. Monies recovered from Owner on behalf of Subcontractor shall be paid by [GC/CM] to Subcontractor less [GC/CM]'s costs for

pursuing same. Subcontractor hereby agrees to make no claim to further payment beyond the Subcontract Price arising out of the acts, errors, or omissions of Owner or its agents or representatives, except to the extent that [GC/CM] may receive funds from Owner on behalf of Subcontractor less costs and expenses incurred by [GC/CM] in prosecuting such claims.”

*Comment: Because of the nature of GC/CM construction and the GC/CM's guaranteed MACC, Subcontract bid package subcontractors look to creditworthiness of the GC/CM when bidding GC/CM projects and understand that the GC/CM is responsible for costs exceeding the MACC plus Owner changes. Subcontractors also expect to recover MACC contingency monies which may be in the control of the GC/CM not the Owner. Where market conditions permit, these provisions may result in higher subcontract bid prices.*

7. Subcontract Agreements Requiring the Subcontractor to Waive Lien Rights Other than to the Extent of Payment

“7.6 When required by [GC/CM] and as a prerequisite to payment, Subcontractor shall provide, in a form satisfactory to [GC/CM], partial lien or claim waivers and affidavits from Subcontractor, and its sub-subcontractors and suppliers for completed work. Such waivers may be made conditional upon payment.”

*Comment: GC/CM drafted progress payment bond and retainage claim waivers frequently require Subcontract bid package bidders to waive all claims for additional compensation through the date of the progress payment period instead of in the amount of the progress payment. Such progress payment bond and retainage claim waivers are sometimes used to argue that subcontractors have waived otherwise valid claims for additional compensation which arose prior to or during the progress payment period, even where the Subcontract bid package bidder has complied with all contract required notice, supplemental information and claims filing procedures. Where market conditions permit, these provisions may result in higher subcontract bid prices.*

8. Subcontract Agreements That Provide That Failure to Provide Notice, Supplemental Information and Claim Filing Within Prescribed Periods Result in Claim Waiver Where the Agreement Between the GC/CM and Public Owner Do Not Include Similar Waiver Language

“E. . . . Failure by Subcontractor to provide timely (as provided in this paragraph) written notice and/or failure by Subcontractor to provide its timely Statement of Claim for an increase in the Subcontract amount and/or time extension shall result in an absolute waiver of Subcontractor's claim. Contractor does not waive the requirement for timely written notice and/or timely written submission of the Statement of Claim, unless Contractor's waiver is unequivocal, explicit and in writing.”

*Comment: While many GC/CM prime contract agreements contain claim perfection requirements requiring notice, supplemental information and claim filing within prescribed time*

periods, most GC/CM agreements require a showing of prejudice before an otherwise valid claim for increased cost of performance or an extension of the contract time is waived. Subcontract agreements which do not contain a similar prejudice requirement are sometimes used to deny otherwise valid claims for additional compensation and time. Where market conditions permit, these provisions may result in higher subcontract bid prices.

D. Subcontract Agreements Requiring the Subcontractor to Provide Work or Services Which Should be Included in the GC/CM's Specified General Conditions

The following requirements were included in all bid packages regardless of scope on a DOC correction facilities project.

"3.5 Heating, Ventilation and Weather Protection. Provide all temporary heating and ventilation equipment and/or weather protection required to meet the requirements of the specifications and/or schedule requirements."

"3.19 Construction Sanitary Facilities. The Contractor shall provide, service and maintain portable toilet units to support it's labor force. As a minimum, the number and configuration of the units shall be in compliance with WISHA/OSHA requirements. The Company will identify the appropriate location for the units."

"5.1 Furnished by Contractor. Except as expressly set forth in Section 5.2 of this Article, Contractor shall, as part of the Scope of Work, supply, install, properly maintain, and remove all temporary construction facilities and utilities necessary for full and complete performance of the Work. Such items shall include, but not necessarily be limited to, those listed below. The type of facilities, move-in and move-out dates, and locations on jobsite shall be subject to and in accordance with the review and approval of Company.

5.1.4 All necessary heating and any heating fuels."

*Comment: Provisions like these cause inefficiency, duplication of subcontractor contributions, wasted resources and are the cause of disputes. Where market conditions permit, these provisions may result in higher subcontract bid prices.*

E. Subcontracts Which Include Work Scope not Customarily Performed by the Subcontract Bidders Performing the Work that Predominates the Bid Package

The majority of problems in this area are caused by the GC/CM requiring one or more subcontractors to perform work which could more efficiently be performed by the GC/CM as part of its specified general conditions or by GC/CMs that subcontract out specified general conditions work to subcontractors.

The issue is also presented in cases of GC/CM buyout errors or where the GC/CM has included work in a bid package that is not performed by the trade contractor performing work that

predominates that bid package. For example, on the Stafford Creek Corrections Center project, the Architectural drawings included a note pointing to a metal building purlin that described the work as Subcontract Bid-Package 20 responsibility (Drywall Subcontract Bid Package). The drywall subcontractor discovered the note during construction and researched the metal building specifications which stated that no metal building components were to be installed by anyone other than the metal building subcontractor. The drywall subcontractor was required to write an RFI to which the GC/CM responded that the metal building work was in the Subcontract Bid-Package 20 subcontractor's responsibility and that the drywall subcontractor would have to pay the metal building contractor to provide and install the disputed work. The drywall subcontractor responded that inclusion of the work was the GC/CM's buyout or coordination error defining the scope between bid packages. The issue created poor contractor relations and took six months and many man hours to resolve.

## **SUBCONTRACTOR RECOMMENDATIONS**

**PUBLIC OWNERS SHOULD DEVELOP STANDARD SUBCONTRACT TERMS AND CONDITIONS FOR USE BY THEIR GC/CMS. ALTERNATIVELY, PUBLIC OWNERS SHOULD REQUIRE REVIEW AND APPROVAL OF THE FORM OF SUBCONTRACT USED BY THEIR GC/CM AND RISK SHIFTING PROVISIONS INCONSISTENT WITH THE BONAFIDE NEEDS OF THE GC/CM BE REMOVED.**

**PUBLIC OWNERS SHOULD DEVELOP STANDARD SPECIFIED GENERAL CONDITIONS AND USE THEM TO SELECT THE GC/CM. THE PUBLIC OWNER'S CONTRACT WITH THE GC/CM SHOULD PRECLUDE THE GC/CM FROM SUBCONTRACTING SPECIFIED GENERAL CONDITIONS WORK.**

**PUBLIC OWNERS SHOULD TAKE STEPS TO INSURE THAT MACC CONTINGENCY MONIES BUDGETED FOR COORDINATION ERRORS ARE USED IN SITUATIONS WHERE THE GC/CM MAKES A BUY OUT ERROR AND PLACES TRADE WORK IN A BID PACKAGE THAT DOES NOT INCLUDE WORK TYPICALLY PERFORMED BY THAT TRADE.**





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### **Subcontract Concerns Regarding Change Order Administration on Large and Complex GC/CM Projects**

#### **A. Overview of Subcontractor Concerns**

Subcontractors are required to finance change order work for extended periods.

#### **B. Background**

Change orders are written orders to the contractor signed by the owner and its design professionals issued after the execution of the contract authorizing a change to the contract scope and price. Change orders are issued as a result of owner-directed design changes, design errors and omissions, differing site conditions, interference by the owner (or in the case of subcontractors, because of GC/CM or subcontractor interference), and delays.

Change orders can exceed 10% of the engineer's estimated construction cost on many complex GC/CM projects. For example, changes increased the base contract price by approximately 30% on the New Seattle Library Project. The percentage of base contract increased by change orders is higher when MACC contingency monies administered through TEAM Change Memorandum are included in the calculation of total change order dollars.

Change order provisions on Washington state GC/CM projects typically require contractors to comply with strict procedural prerequisites as a condition of the contractor's right to recover additional compensation or time. Typically these provisions require the contractor to provide the owner with written notice of an occurrence which might give rise to additional compensation or time, supplemental cost and schedule information, and a certified claim within prescribed time periods. Some public owners include unreasonably short durations for one or more of the procedural prerequisites. Most public owner contracts include waiver language precluding two part change orders, i.e., a change order for the direct cost of the change and a separate change order for impact costs due to the change. These contracts generally provide that the public owner's response to the contractor's certified claim is a condition precedent to the contractors right to bring legal action to recover money spent performing changes.

Many public owner GC/CM contracts include numerous and cumbersome procedural and administrative steps which are conditions precedent to the contractor's right to seek judicial relief.

Public owner GC/CM contracts often include changes provisions placing no obligation on the public owner to respond to change order proposals even to respond to certified claims by a date certain before the project is substantially complete.

These factors result in subcontractors on GC/CM projects financing change order work for extended periods. It is not unusual for subcontractors on complex GC/CM projects to finance change order work valued at ultimate payment in excess of seven figures for one or two years.

C. Example of GC/CM Contract with Numerous Steps for Change Resolution

Attached are matrixes of the steps necessary to resolve a contractor's claim for cost or time caused by an express or constructive change to the work for the New Seattle Library and the Bellevue City Hall projects. The matrixes are representative of many GC/CM project contract changes and disputes resolution procedures.

D. Example of GC/CM Contract with Unreasonably Short Time Frame for Claim Submission and Waiver for Failure to Comply

The following provision from a City GC/CM contract contains an unreasonably short time period for certified claim submission and language making failure to comply a waiver of the contractor's right to recover for the change regardless of merit:

Within 30 days of the occurrence of the event giving rise to the request, unless Owner agrees in writing to allow an additional period of time to ascertain more accurate data which shall not be unreasonably withheld, the GC/CM may submit a Claim pursuant to Section 8.01. When the request for compensation relates to a delay, or other change in Contract Time, the GC/CM shall demonstrate the impact on the critical path, in accordance with Section 7.03D. Failure to provide such additional information and documentation within the time allowed or within the format required shall constitute a waiver of the GC/CM's right to an equitable adjustment.

E. Example of GC/CM Contract Providing That the Public Owner Has No Obligation to Respond to the Contractor's Certified Claim Until Substantial Completion of the Work

C. After the GC/CM has submitted a fully documented Claim that complies with all applicable provisions of Parts 7 and 8, Owner shall respond, in writing, to the GC/CM as follows:

1. If the Claim amount is less than \$50,000, with a decision within 60 days from the date the Claim is received; or
2. If the Claim amount is \$50,000 or more, with a decision within 60 days from the date the Claim is received, or alternatively with notice to the GC/CM of

the date by which it will render its decision. The Owner will then respond with a written decision in such additional time, which shall occur prior to the date of Substantial Completion.

## **SUBCONTRACTOR RECOMMENDATIONS**

**PUBLIC OWNERS SHOULD ALLOCATE MORE RESOURCES TO PROJECT DESIGN.**

**PUBLIC OWNERS SHOULD RETAIN THIRD PARTIES TO PERFORM DESIGN DOCUMENT CONSTRUCTABILITY REVIEWS.**

**GC/CM SPECIFIED GENERAL CONDITIONS SHOULD REQUIRE CONSTRUCTION DOCUMENT CONSTRUCTABILITY REVIEWS BY THE GC/CM BEFORE SUBCONTRACT BID PACKAGES ARE PUT OUT TO BID. IF PROBLEMS ARE DISCOVERED THEY SHOULD BE REMEDIED BEFORE THE PACKAGE IS BID AND, WHERE APPROPRIATE, THE MACC SHOULD BE ADJUSTED ACCORDINGLY.**

**PUBLIC OWNERS SHOULD BE OBLIGATED TO IMPLEMENT PROCEDURES FOR ANALYZING, NEGOTIATING AND PAYING CHANGE ORDER IMPACT CLAIMS DURING CONSTRUCTION.**

**PUBLIC OWNER GC/CM CONTRACTS SHOULD PERMIT TWO PART CHANGE ORDERS ON PROJECTS WHERE CHANGES ARE ANTICIPATED TO EXCEED 10% OF THE BASE CONTRACT AND AFTER THEY REACH 5% OF THE MACC.**

**PUBLIC OWNERS SHOULD BE REQUIRED TO RESPOND TO CHANGE ORDER PROPOSALS AND TO ANSWER CLAIMS WITHIN A REASONABLE PERIOD OF TIME AFTER SUBMITTAL IN THE CONTRACTUALLY REQUIRED FORMAT.**

**PUBLIC OWNERS SHOULD NOT BE PERMITTED TO INCLUDE PROVISIONS THAT PURPORT TO WAIVE CONTRACTORS' RIGHTS TO COMPENSATION OR TIME FOR CHANGES FOR FAILURE TO STRICTLY COMPLY WITH CLAIM PERFECTION REQUIREMENTS UNLESS THEY CAN DEMONSTRATE PREJUDICE.**

# NEW SEATTLE LIBRARY PROJECT

## Matrix of Changes and Disputes Procedures

| A  | B   | C  | D  | E  | F  | G  | H   | I   | J   |
|--|---|--|--|--|--|--|---|---|---|
| Article 7.02.A.2.a and b and 7.03.B.1&2<br>7 day Notice  | Article 7.02.A.2.C<br>30 day Supplemental Information   | Article 7.01.E<br>Demand For Final Offer from Owner  | Article 7.01E<br>Owner's 30 Day Response   | Article 8.01.B Claim<br>GC/CM must file an eight part Certified Claim within the earlier of 120 days of Owner's final offer under 7.01.E or within thirty (30) days from the Completion date | Article 8.01.D Claim Response<br>If the Certified Claim less than \$50,000, Owner must respond within 60 days<br><br>If Claim is \$50,000 or more Owner must respond within 60 days or provide date on which a decision will be made (note: There is no Owner deadline for responding to claims over \$50,000) | Article 8.02...A<br>14 Day Notice of Appeal of Owner's 8.01.D Decision<br><br>If GC/CM disagrees with Owner's Decision, the GC/CM must provide notice of Appeal to the DRB within 14 days of Decision. Failure to provide notice of Appeal results in Owner's decision being final and binding | Article 8.02.G<br>DRB Hearing<br><br>The DRB Hearing shall be within 30 days of the date of receipt of written notice of Appeal unless otherwise agreed | Article 8.02.I. Notice re Dispute Status<br><br>Within 30 days of receipt of DRB Decision, GC/CM and Owner must notify the each other that they concur or disagree, i.e. the dispute is either resolved or unresolved | Article 8.02.I.<br>Lawsuit<br><br>Should the dispute remain unresolved, the GC/CM must file lawsuit within 120 days of DRB decision in King County Superior Court, unless requirements is waived in writing by the owner or the DRB decision is final and binding |
| Notice of occurrence must be delivered to Owner within 14 (use less) days of the occurrence of the event giving rise to the request for EA in price and/or time.<br><br>14 day Notice should describe (1) the event, (2) the nature of the impacts, and (3) to extent possible the dollar amount | Within 30 days of the 14 day Notice, the GC/CM must provide supplemental supporting data including (1) the dollar amount itemized per contract, (2) specific facts and circumstances confirming damages and cause effect between change or act and damages claimed, and (3) documentation permitting analysis by Owner<br><br>If an increase in Contract Time is requested supplement must demonstrate impact on CP in accordance w/ 7.03.D | The GC/CM must submit a Change Order Proposal (COP) in accordance with 7.01.C (note: There is no time deadline in the contract by which the Owner must respond to a COP or negotiate with the GC/CM)<br><br>If GC/CM and Owner are unable to reach agreement on the Contractor's COP then the Contractor must request a Final Offer from Owner | Owner must respond to Request for Final Offer within 30 days<br><br>If GC/CM rejects Owner's final offer and parties are unable to agree, proceed to Article 8 | GC/CM must include all Article 8.01.C subpart information, including certification   |  |  |   |   |   |
| No right to Equitable Adjustment if notice if later than 14 days   |   |  |  |  |  |  |   |   |   |
|  |   |  |  |  |  |  |   |   |   |

# BELLEVUE CITY HALL

## Matrix of Changes and Disputes Procedures

| A   | B   | C  | D  | E  | F  | G   | H  | I   |
|---|---|--|--|--|--|---|--|---|
| <p>GC/CM Article 5.11<br/>7 day notice</p> <p>Must give prompt notice of differing site conditions and in no event later than 7 days after first observation of conditions and before the conditions are disturbed then make claim per Article 7, i.e., 14 days and 30 days</p> | <p>GC/CM Article 7.02.A.1.a<br/>14 day notice</p> <p>Notice within 14 days of the occurrence of the event giving rise to the request for change</p> <p>Occurrence means when GC/CM knew of the event</p> <p>Notice must include (1) description of event, (2) nature of the impact, and to the extent possible (3) amount of time requested</p> | <p>GC/CM Article 7.01.C<br/>Change Order Proposal</p> <p>Provided notice is complied with the GC/CM may submit a Change Order Proposal.</p> <p>The Owner may request a change order proposal. If the Owner request a COP GC/CM must respond and submit COP within 14 days of request or as mutually agreed.</p> <p>COP must include all costs including dollar amount, time delays, disruption or loss of efficiency</p> <p>(Note: There is <u>no</u> Owner obligation to respond to GC/CM's COP by a date certain</p> | <p>GC/CM Article 7.01.F 1-5<br/>Construction Change Directive</p> <p>If GC/CM receives a Construction Change Directive (CCD) the GC/CM must respond in 7 days if disagree. If do not, then accept terms of CCD.</p> <p>If do not respond or if disagree or if costs are to be determined, must keep records per Arch req. and present within 21 days of request. Failure is waiver of Claim</p> <p>Reservations are permitted under some circumstances</p> | <p>GC/CM Article 7.02.A.1.c<br/>and 8.01.B<br/>30 Day Claim</p> <p>Submit a Certified 8.01.B Claim within 30 days of occurrence unless Owner agrees to more time or Claim is Waived</p> <p>Claim must include all 8.01.B subpart 1-9 information</p> | <p>GC/CM Article 8.01.C<br/>Owner Response to 8.01.B Claim</p> <p>If claim less than 50K Owner must respond with a decision within 60 days</p> <p>If claim is 50K or more Owner must respond with a decision or with notice of when decision will be made</p> <p>Note: There is <u>no</u> Owner obligation to respond to Claim prior to substantial completion</p> | <p>GC/CM Article 8.02.B<br/>Dispute Resolution</p> <p>Within 30 days of Receipt of Claim Owner may require City Manager or designee and Contractor to meet and resolve during the following 21 days</p> | <p>GC/CM Article 8.02.C<br/>Mediation</p> <p>If Article 8.02.B meeting is unsuccessful, must mediate as prerequisite to right to file suit</p> <p>If mediator not agreed upon within 30 days of demand, file request for mediator with AAA</p> | <p>Litigation</p> <p>After mediation must file and serve lawsuit within the earlier of 120 days after the Date of Substantial Completion or 60 days of Final Acceptance</p> |
|   |   |  |  |  |  |   |  |   |
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### **Subcontractor Issues Concerning GC/CM Prime Contract MACC Contingency and Incentive Provisions Tied to MACC Contingency**

#### **A. Overview of Subcontractor Concerns**

Certain public owners authorized to use GC/CM include "incentive clauses" in their GC/CM contracts which are connected to the GC/CM's performance after buy out and permit the GC/CM to recover unused MACC contingency monies that have been budgeted for design and subcontractor coordination errors as additional fee. These provisions create a potential for conflict of interest, may frustrate the purpose of the MACC contingency, and may result in subcontractors absorbing costs properly attributed to others.

#### **B. Background**

##### **1. Contingencies in Traditional Design-Bid-Build Construction Contracts**

Contingency is a design or construction budget sum designated by the owner and contractor to cover unpredictable or unforeseen items of work or risks. Owners and general contractors performing traditional Design-Bid-Build construction contracts have historically included contingencies in their budgets for unanticipated circumstances including scope changes, differing site conditions, market conditions and other unanticipated events, as well as risk.

##### **2. Contingencies are Authorized in GC/CM Construction**

The statutory scheme authorizing GC/CM construction also contemplates "budget contingency" will be required and requires public bodies to include a budget contingency of not less than five percent (5%) of the anticipated contract value. RCW 39.10.070(7) provides:

"(1) A public body utilizing the alternative public works contracting procedures authorized under RCW 39.10.050 and 39.10.060 shall provide for: . . . (c) Reasonable budget contingencies totaling not less than five percent of the anticipated contract value; . . ."

While the legislature likely intended that the mandatory budget contingency belong to the public owner, the statute does not explicitly specify the distribution of the contingency, i.e., there is no prescription in the statute regarding whether the 5% contingency belongs to the Owner or the GC/CM.

### 3. Owner's Contingency vs. GC/CM Contingency

Public owners using GC/CM frequently include two types of contingency: (1) an "Owner's Contingency" for changes to the work such as owner directed scope changes, design errors, differing site conditions and other unforeseen events that may increase construction costs, and (2) a contingency for the GC/CM commonly termed a "MACC Contingency" for GC/CM risks such as errors and omissions in subcontract buy out, GC/CM coordination errors in the design documents, and increased cost of subcontractor performance caused by interference or lack of coordination between the GC/CM and subcontractors or between subcontractors. The sum of these two contingencies often exceeds five percent of the anticipated contract value and may be as high as 10% of the anticipated contract value.

### 4. Examples of GC/CM Contingency Provisions

The following are examples of typical "Owner's Contingency" and "MACC Contingency" provisions from a state university GC/CM contract:

#### Public Owner Contingency:

"6.3.2 The Owner shall maintain a contingency for Owner-directed changes.

#### MACC Contingency:

6.3.3 The MACC shall include a 5% MACC Contingency Account for bid protection and construction as outlined in 6.3.4 to be utilized by Contractor according to 6.3.4. The Contractor's use of the MACC Contingency Account must be approved by the Owner. The Contractor shall provide the Owner with monthly updates of the contingency use.

6.3.4 The Contractor shall be responsible for all costs related to bid overages, subcontractor claims or charges that result from mistakes or omissions in the subcontract buyout, or coordination errors and omissions in the Construction Documents or interference between subcontractor and the Contractor or between subcontractors or other subcontractors. The Contractor may utilize the MACC Contingency Account established in 6.3.3 in the following manner:

6.3.4.1 Up to 3% may be utilized to fund any difference between the estimated and the actual subcontractor bid packages total.

6.3.4.2 Any remaining funds may be utilized to fund subcontractor claims or charges that result from mistakes or omissions in the subcontract buyout, or coordination errors and omissions in the Construction Documents, or interference between subcontractor and Contractor or between subcontractors and other subcontractors."

## 5. Incentive Provisions in GC/CM Contracts

RCW 39.10.061(8) permits public owners using GC/CM to include incentive provisions in their GC/CM agreements:

(8) A public body may include an incentive clause in any contract awarded under this section for savings of either time or cost or both from that originally negotiated. No incentives granted may exceed five percent of the maximum allowable construction cost. If the project is completed for less than the agreed upon maximum allowable construction cost, any savings not otherwise negotiated as part of an incentive clause shall accrue to the public body. If the project is completed for more than the agreed upon maximum allowable construction cost, excepting increases due to any contract change orders approved by the public body, the additional cost shall be the responsibility of the general contractor/construction manager.

Incentive provisions in GC/CM contracts typically fall into two categories: (1) incentives related to completion of schedule milestones, and (2) incentives related to subcontractor buy out. These provisions often permit the GC/CM to recover additional fee for meeting specified schedule milestones and buyout of subcontracts under budget. Examples of such incentive provisions from a State University GC/CM contract is as follows:

“5.6 Schedule Incentive. In the event the Contractor achieves Substantial Completion of the work within the time frame set forth below the Contractor shall be entitled to the incentive payments shown [below], provided however, if the Work is not complete by the date show irrespective of whether the delay is caused by the Owner, the Contractor, or others including unforeseen conditions or force majeure the incentives will not be earned.

5.6.1 For achieving Substantial Completion of the football locker, training and main equipment rooms as described in the contract documents prior to August 1, 2000 Contractor shall earn an incentive of \$1,000 per day for each complete day that the owner has Substantial Completion prior to August 1, 2000 not to exceed a total of \$30,000.

5.6.2 For achieving substantial completion of all work prior to November 1, 2000 the Contractor shall earn an incentive of \$1,650 per day for each complete day that the Owner has substantial completion prior to November 1, 2000 not to exceed a total of \$50,000.

6.7.7 If the Contractor is successful in awarding contracts for all of the subcontracts in its approved Subcontract Plan in an amount less than the negotiated MACC, then the Contractor may retain the savings up to an amount not to exceed \$1,000,000 as an incentive payment for completing the subcontract buyout within the negotiated MACC. Additional savings up to an amount not to exceed \$500,000 may be retained



by the Contractor for its use as a MACC Contingency Account to be administered in accordance with the provisions of section 6.3.3. Any remaining savings shall be utilized to fund alternates as directed by the Owner or shall be returned to the Owner.

6.3.3 The Contractor shall be responsible for all costs related to subcontractor claims or charges that result from mistakes or omissions in the subcontract buyout, or coordination errors and omissions in the Construction Documents, or interference between subcontractors and the GCCM or between subcontractors and other subcontractors. The Contractor may utilize the MACC Contingency Account established in section 6.7.4 to pay for changes that result from mistakes or omissions in the subcontract buyout, or change orders that result from coordination errors and omissions in the Construction Documents. The Contractor's use of the MACC Contingency Account must be approved by the Owner. The Contractor shall provide the Owner with monthly updates of the contingency use."

#### 6. Incentive Provisions for "Proactive Project Management"

Certain public owners include a third type of incentive provision in their GC/CM prime contract agreements that is sometimes called a "Proactive Construction Management Contingency" that permits the GC/CM to recover additional fee if MACC Contingency monies that are intended for risks associated with coordination errors and omissions in the Construction Documents, and interference between subcontractor and the GC/CM or between subcontractors and other subcontractors are not used. Examples of this type of incentive provision from a State University and a City GC/CM contract are as follows:

##### State University Project:

"5.6.2 Incentive for Savings Resulting From Proactive Construction Management. If there are any savings from the MACC Contingency after Contractor has used it according to Section 6.3.3, the savings shall be divided as follows: Owner 50%, Contractor 35%, Architect 15%.

6.3.3 The MACC shall include a 5% MACC Contingency Account for bid protection and construction as outlined in 6.3.4 to be utilized by Contractor according to 6.3.4. The Contractor's use of the MACC Contingency Account must be approved by the Owner. The Contractor shall provide the Owner with monthly updates of the contingency use.

6.3.4 The Contractor shall be responsible for all costs related to bid overages, subcontractor claims or charges that result from mistakes or omissions in the subcontract buyout, or coordination errors and omissions in the Construction Documents or interference between subcontractor and the Contractor or between subcontractors or other subcontractors. The Contractor may utilize the MACC Contingency Account established in 6.3.3 in the following manner:

6.3.4.1 Up to 3% may be utilized to fund any difference between the estimated and the actual subcontractor bid packages total.

6.3.4.2 Any remaining funds may be utilized to fund subcontractor claims or charges that result from mistakes or omissions in the subcontract buyout, or coordination errors and omissions in the Construction Documents, or interference between subcontractor and Contractor or between subcontractors and other subcontractors."

City Project:

"7. The City will receive any balance remaining in the Owner's Contingency at Final Completion. [GC/CM] will receive any balance remaining in the GC/CM Contingency at Final Completion. The GC/CM will receive any balance remaining in the non-pass-through allowances included in subcontractor bid packages and listed in Attachment A. If the parties disagree on the allocation of a cost to the above categories, 50% of the cost will initially be allocated to the respective category specified by each party (and, if no balance remains in a category, funded by the respective party), and the final allocation will be resolved through the dispute resolution procedure of the Contract."

C. Subcontractor Concerns with Incentive Provisions Tied to MACC Contingency That is Intended to Be Used for Coordination Errors

Subcontractors are concerned that incentive provisions tied to the use of MACC contingency budgeted for coordination errors and omissions in the Construction Documents or interference between subcontractor and the Contractor or between subcontractors or other subcontractors may create a potential for the GC/CM to have conflict of interest, may frustrate the purpose of the MACC contingency, and may result in subcontractors absorbing costs properly attributed to others.

MACC Contingency can be as much as \$2.5 million on a \$50 million dollar public works project. GC/CM fees on such projects may be as low as 1.9% to 3.0% of the MACC. Where the GC/CM contract permits the GC/CM to recover MACC Contingency monies as additional fee if the GC/CM does not disburse the contingency (does not recognize and pay subcontractors for design and coordination errors), there is a strong financial incentive for the GC/CM to refuse to recognize and compensate subcontractors for these problems from the contingency. When this occurs, the purpose of the MACC Contingency is frustrated because funds allocated for identified MACC Contingency risks remain unused. If design and coordination errors occur and MACC Contingency is not used, subcontractors may be required to absorb costs bringing the project on line, on time, and on budget despite the errors.

## **SUBCONTRACTOR RECOMMENDATIONS**

**INCENTIVE PROVISIONS TIED TO MACC CONTINGENCY EXCEPT FOR SCHEDULE MILESTONES AND BUY OUT CONTINGENCY SHOULD BE PROHIBITED.**

**PUBLIC OWNERS SHOULD BE CAREFUL TO DRAFT CONTINGENCY PROVISIONS SO THAT THE PUBLIC OWNER, NOT THE GC/CM HAS CONTROL OVER THE CONTINGENCY.**

**PUBLIC OWNERS MUST TAKE STEPS TO INSURE THAT MACC CONTINGENCY IS USED FOR ITS INTENDED PURPOSE, PARTICULARLY WHERE ONE OR MORE SUBCONTRACTORS ARE ADVERSELY AFFECTED BY SCHEDULING AND RESEQUENCING DECISIONS MADE TO MITIGATE DESIGN COORDINATION OR SUBCONTRACTOR COORDINATION ERRORS.**

**WHERE PUBLIC OWNERS INTEND TO SHIFT SPECIFIC RISKS TO THE GC/CM, SUCH AS SUBCONTRACTOR BUYOUT, PUBLIC OWNERS MUST BE CAREFUL TO DRAFT CLEAR AND UNAMBIGUOUS LANGUAGE REGARDING THE RISK INTENDED TO BE SHIFTED.**

**IN CIRCUMSTANCES WHERE PUBLIC OWNERS SHIFT RISK AND NEVERTHELESS CHOOSE TO BUDGET MACC CONTINGENCY MONIES FOR SPECIFIED RISK, PUBLIC OWNERS MUST RESERVE CONTROL OVER THE USE OF THE MACC CONTINGENCY AND TAKE AFFIRMATIVE STEPS TO INSURE MACC CONTINGENCY IS USED AS INTENDED.**



## **MECHANICAL CONTRACTORS ASSOCIATION OF WESTERN WASHINGTON**

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### **Subcontractor Concerns regarding bidder eligibility for subcontract work**

#### **A. Overview of subcontractor Concerns**

The requests for eligibility from GC/CM's often contain evaluation criteria that is not specifically allowed by statute and the responses may require an excess amount of time to prepare just to allow the subcontractor to bid.

#### **B. Background**

39.10.061 allows GC/CM's to make a determination of bidder eligibility when such eligibility is "critical to the successful completion of a subcontractor bid package." There are 8 categories of evaluation criteria spelled out in the statute. Often times, the GC/CM does not follow the criteria in the statute and creates new criteria by which the subcontractors eligibility is to be judged. This may allow a GC/CM to design a selective process that would only allow particular subcontractors to become eligible.

Some requests for eligibility have become so voluminous and detailed that the subcontractor has to spend many hours and resources to respond to the eligibility.

This may deter some otherwise eligible subcontractors from responding because a successful eligibility response only allows the subcontractor an opportunity to spend more resources to bid the project. This means that the public may not be provided with the widest range of bids possible.

#### **C. Example of criteria beyond the statute and request for more information that is required to determine simple eligibility.**

The following is excerpted from a request for eligibility from a GC/CM , on a large High school project.

"1. AIA Document A305 Contractors Qualification Statement." This document requires more detail than is allowed by statute.

"3. Quality of Safety Program. Fill out the safety pre-qualification form attached. Submit a copy of your jobsite safety plan." This requires another level of form to be filled out. In addition it requires the subcontractor to prepare a jobsite safety plan before the project is even out to bid. There is no criteria included as to how this information will be judged or what parameters are important. It allows the GC/CM to make up any kind of scoring process to exclude any particular subcontractor.

D. Example of criteria above and beyond what is provided in the statute.

The following are excerpts from a GC/CM request for eligibility on municipal project.

"8.a. Provide a copy of your firms affirmative action program"

E. Example of scoring that is far and above what is necessary for a subcontractor to be judged eligible.

See attached "SAMPLE A" for scoring of net worth. This points system cannot be related to any kind of standard.

F. Subcontractor Recommendations

- a. Design the eligibility to mirror the statute both in terms and order of criteria.
- b. Do not add criteria that are not allowed by statute.
- c. Keep scoring simple and "pass- fail" as appropriate.
- d. Set criteria based on the actual project that is being considered in terms of size and complexity.
- e. Use the attached "Model Eligibility".

March 29, 2005

## Model Eligibility Draft

Based on RCW 39.10.061 paragraph (6) requirements.

- (a) Adequate financial resources or the ability to secure such resources:
  - 1. Proposer must have ability to provide payment and performance bonds in an amount of \$Enter subcontract value from MACC here. Provide a letter from your surety confirming bonding capacity is available for this project if you are declared eligible.
  - 2. Provide proof of adequate financial resources to complete this project:
    - i. Include a memo from proposer's President or Corporate Officer, confirming the availability of net worth or credit line to complete this project.
- (b) History of successful completion of a contract of similar type and scope:
  - 1. List a maximum of 3 projects that your firm has successfully completed with the following characteristics:
    - i. Mechanical value of \$ \_\_\_\_\_
    - ii. Indicate types of mechanical systems: HVAC, plumbing, controls
  - 2. Provide 2 current references for each of the following categories:
    - i. Public Owner
    - ii. General Contractor
    - iii. Consulting Mechanical Engineer
- (c) Project management and project supervision personnel with experience on similar projects and the availability of such personnel for the project.
  - 1. Provide a resume for the proposed project manager and list the similar project experience. Confirm that individual is available.
  - 2. Provide a resume for the proposed field manager or superintendent and list the similar project experience. Confirm that individual is available.
- (d) Current and projected workload, and the impact the project will have on the subcontractor's current and projected workload:
  - 1. List value of the current backlog and projected workload. Describe the impact the project will have on the subcontractor's current and projected workload.
- (e) Ability to accurately estimate the subcontract bid package scope of work:
  - 1. List 3 projects of similar type and value that the subcontractor has accurately estimated and successfully completed.
  - 2. Provide a description of estimating techniques.

(f) Ability to meet subcontract bid package shop drawing and other coordination procedures:

1. Provide a work plan to produce shop drawings and manage coordination. [GC/CM may want to provide a description of their coordination plan for response.]

(g) Eligibility to receive an award under applicable laws and regulations:

1. List any bond defaults.
2. Provide a letter from your insurance broker confirming your firm's ability to provide insurance coverage.
3. Provide contractors license number.

(h) Ability to meet subcontract bid package scheduling requirements:

1. Provide a description of techniques used to meet scheduling requirements as a subcontractor.

March 29, 2005

## Model Eligibility – Score Sheet

### Step 1

| Ref.<br>Item # | Item                         | Min Requirement                   | Y | N |
|----------------|------------------------------|-----------------------------------|---|---|
| (a) 1.         | Bonding Capacity             | Letter from Surety                |   |   |
| (a) 2.         | Adequate Financial Resources | Memo from President               |   |   |
| (b) 2.         | References                   | (2 each from Owner, GC, Engineer) |   |   |
| (g) 1.         | Bond defaults                | Yes – means none (eligible)       |   |   |
| (g) 2.         | Insurance                    | Confirmation from Insurance Co.   |   |   |
| (g) 3.         | Contractor's License         | Active Contractors License #      |   |   |

- If all are "YES", then proceed to Step 2
- If any are "NO," then subcontractor is not eligible.

### Step 2

| Ref.<br>Item #               | Item                                      | Min.<br>Requirement      | Points<br>Available | Pts.<br>Judged |
|------------------------------|---|--------------------------|---------------------|----------------|
| (b) 1. i.                    | Projects of size                          | 3 projects of \$xxx      | 15                  |                |
| (b) 1. ii.                   | Systems type                              | HVAC, Plumbing, Controls | 5                   |                |
| (c) 1.                       | Availability / Resume for Project Manager |                          | 10                  |                |
| (c) 2.                       | Availability / Resume for Superintendent  |                          | 5                   |                |
| (d) 1.                       | Impact of workload                        |                          | 5                   |                |
| (e) 1.                       | Estimated packages                        |                          | 3                   |                |
| (e) 2.                       | Description of estimating techniques      |                          | 2                   |                |
| (f) 1.                       | Shop drawing work plan                    |                          | 3                   |                |
| (h) 1.                       | Scheduling requirements                   |                          | 2                   |                |
| TOTAL                        |   |                          | 50                  |                |
| Eligible if points exceed 30 |   |                          |                     |                |

Eligible:

☐ Yes

☐ No



**No**SAMPLE - "H. Eat, Cool & Sons Mechanical" - SAMPLE **A**

| PRE-QUALIFICATION EVALUATION - SUMMARY WORKSHEET |  |                           |                      |                 |
|--|--|---------------------------|----------------------|-----------------|
| Category   |  | Maximum Assignable Points | Sample Actual Points | *Minimum Points |
| 1.   | License                                      | 1                         | 1                    |                 |
| 2.   | Construction Experience                      |                           |                      |                 |
|  | a. Total amount                              | 10                        | 5                    | 3               |
|  | b. City of Bellevue Experience               | 2                         |                      |                 |
|  | c. Public works Experience                   | 3                         |                      |                 |
|  | d. Completion record                         | 5                         | 3                    |                 |
| 3.   | Computer aided drafted coordination drawings |                           |                      |                 |
|  | a. Number of projects                        | 10                        | 5                    | 3               |
|  | b. On site facilities                        | 5                         | 1                    |                 |
| 4.   | Financial Data                               | 6                         | 3                    |                 |
| 5.   | Safety                                       |                           |                      |                 |
|  | a. EMR                                       | 6                         | 2                    |                 |
|  | b. Program                                   | 1                         | 1                    | 1               |
| 6.   | Surety                                       |                           |                      |                 |
|  | a. Complete work                             | 1                         | 1                    | 1               |
|  | b. Bonding capacity                          | 1                         | 1                    | 1               |
|  | c. Surety Rating                             | 1                         | 1                    | 1               |
| 7.   | Insurance                                    |                           |                      |                 |
|  | a. Limits                                    |                           |                      |                 |
|  | General liability                            | 1                         | 1                    | 1               |
|  | Auto liability                               | 1                         | 1                    | 1               |
|  | b. Declaration                               | 1                         | 1                    | 1               |
| 8.   | Affirmative Action Program                   |                           |                      |                 |
|  | a. Program Submitted                         | 3                         | 3                    |                 |
|  | b. Program Utilized                          | 3                         |                      |                 |
| 9.   | Staff Roster                                 | 5                         | 3                    | 3               |
| 10.  | Quality Assurance Program                    | 5                         | 3                    | 3               |
| 11.  | Current and Projected workload               | 5                         | 2                    |                 |
| TOTALS   |  | 76                        | 38                   |                 |

\*These are mandatory requirements. Bidders who fail to meet point minimums of any category line item with a stated minimum in this column will not be eligible to bid. At least 36 points total are required to be eligible for bidding.

EXAMPLE OF WHAT IS  
NOT INTENDED BY  
PAGE 6